Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
National Association of State Utility	)	**CG Docket No. 04-208**
Consumer Advocates' Petition for	)	
Declaratory Ruling Regarding Monthly	)	
Line Items and Surcharges Imposed	)	
By Telecommunications Carriers	)	

REPLY COMMENTS OF VERIZON WIRELESS

VERIZON WIRELESS

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SUMMARY

No commenter has established that the Commission could grant the NASUCA *Petition* due to its procedural flaws. First, it asks the Commission to reverse course and prohibit line items in the face of Commission rules and policy that expressly permit such line items. The Commission cannot take such action or alter its decision to forbear from the regulation of CMRS rates in response to a petition for declaratory ruling. Instead, a new rulemaking would be necessary. Granting the *Petition* is also not necessary because the Commission can deal with misleading or otherwise unlawful surcharges by exercising its enforcement authority.

The Commission should also reject the *Petition* as a matter of policy. Parties supporting NASUCA fail to address the serious First Amendment problems that would result from a government attempt to suppress carriers' ability to communicate information to customers about government-imposed fees and costs. Moreover, contrary to the claims of those supporting the *Petition,* the *Petition* would impede competition rather than promoting it by forcing carriers to develop standardized practices. Recent developments show that many carriers are providing information to subscribers about line items. For example, all of the major wireless carriers are voluntary participants in the CTIA's Consumer Code, which requires disclosure of whether taxes, fees, or surcharges apply, and if so their range. The Code requires carriers to distinguish between taxes, fees, and surcharges that are collected and remitted to the government and those fees that are designed to recover costs. In addition, Verizon Wireless and two other national wireless carriers and the Attorneys General in 32 states have agreed to a detailed set of disclosure requirements, including disclosures and billing practices related to taxes and carrier-imposed surcharges.

In denying the *Petition,* the Commission should also declare that state regulation of CMRS line items is preempted. Line items are rate elements and are therefore subject to the preemption of rate regulation established in 47 U.S.C. § 332.

Finally, the Commission should not impose standard labeling requirements as part of this proceeding. NASUCA has provided no evidence that labels used by carriers are misleading. Standardized labeling would likely be an unlawful restriction on commercial speech. Commission-mandated labels would also not necessarily be clearer than carrier labels.

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Verizon Wireless respectfully submits reply comments on the *Petition*[1] filed by the National Association of State Utility Consumer Advocates ("NASUCA") in the captioned proceeding. Verizon Wireless urges the Commission to deny the *Petition.*

The record in this proceeding confirms that the Commission cannot and should not grant the *Petition.* NASUCA's request is procedurally flawed, conflicts with prior FCC decisions, and is factually unsupported. It unlawfully demands that the FCC deprive carriers of their First Amendment rights to communicate to their subscribers the growing tax and regulatory burdens being imposed on the telecommunications industry.

I. THE *PETITION* IS PROCEDURALLY DEFECTIVE

Although the record is divided between carriers and government regulators on whether the Commission should consider the substance of NASUCA's request, no party has provided a rationale that would overcome the *Petition*'s procedural flaws. As the comments make clear, the Commission should deny the *Petition* because it unlawfully asks the Commission to take action that is inconsistent with existing Commission rules.

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[1] National Association of State Utility Consumer Advocates Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format, filed March 30, 2004.

A declaratory ruling is in any event unnecessary given the FCC's authority to consider the reasonableness of individual carrier practices in the context of enforcement proceedings under those rules and under Section 201 of the Communications Act.

A. The Commission Should Dismiss NASUCA's Request to Regulate CMRS Rates as a Matter of Law

Numerous commenters urge the Commission to deny NASUCA's *Petition* because it seeks to change existing law in the context of a declaratory ruling.[2] Declaratory rulings are appropriate where parties are seeking a statement or interpretation of existing law and where there are no facts in dispute, but by seeking to ban surcharges even when they have been authorized by the FCC and challenging every non-mandated surcharge as essentially misleading, the *Petition* seeks relief that could not be granted in a declaratory ruling.[3]

The *Petition* fails on two grounds. First, as Verizon Wireless and others detailed in their comments, the FCC has already permitted line-item surcharges in several different contexts, and NASUCA cannot seek a reversal of these decisions through a declaratory ruling. To modify existing rules, NASUCA must seek a new rulemaking.[4] Second, line-item surcharges are rates or rate elements,[5] and the FCC has decided to

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[2] Comments of AT&T Corp. at 5-8; Comments of BellSouth at 5; Comments of Cingular at 7-8; Comments of CTIA at 21-25; Comments of MCI, Inc. at 4; Comments of Sprint Corporation at 4.

[3] *See* Comments of Sprint Corporation at 4.

[4] *Id.* at 4-6; Comments of Verizon Wireless at 6-8.

[5] *See, e.g., USF Contribution Order,* 17 FCC Rcd at 24979, ¶ 53 n.133 ("incumbent local exchange carriers are required to recover their federal universal service contribution costs through *a line item*, which may be combined for billing purposes with *another rate element*") (emphasis added); Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board On Universal Service, *Sixth Report and Order in CC Docket No. 96-262,* 15 FCC Rcd 12962, 13057-58, ¶¶ 218-19 (2000) (approving plan permitting local phone companies to

forbear from regulating CMRS rates.[6] As detailed in Nextel's comments, the FCC would have to conduct notice and comment rulemaking to change its decision to forbear from regulating CMRS rates.[7] For both reasons, the FCC should dismiss the *Petition* as a matter of law.

B. The Commission Can Take Enforcement Action Where Necessary to Deal With Misleading Line Items

NASUCA argued in the *Petition* that because there are so many carriers doing business, it would be administratively impossible to review each carrier's practices, and the Commission should instead "prohibit all line-items, surcharges and fees" unless mandated by the federal, state, or local government.[8] NASUCA thus seeks an outright ban on all line items.

In support of the NASUCA request, some commenters suggest that the sweeping relief NASUCA seeks is warranted because consumers who are seeking the benefits of a competitive marketplace are being provided misinformation.[9] Other commenters argue that carriers are not following the FCC's truth-in-billing rules.[10]

When the FCC adopted the *Truth-in-Billing Order,* it specifically cautioned carriers that their line items would be subject to scrutiny under Section 201(b) and

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establish a "*separate rate element (*e.g.*, line item)*" to recover federal universal service contributions) (emphasis added)

6 Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, *Second Report and Order,* 9 FCC Rcd 1411, 1478 (1994) ("*Second CMRS Order*").

7 Comments of Nextel at 28.

8 *Petition* at 24.

9 Comments of the New Jersey Division of the Ratepayer Advocate at 2; Comments of the Indiana Office of Utility Consumer Counselor at 3-4 (carriers' use of non-mandatory line items is "misleading, deceptive, unreasonable, unjust, anticompetitive, and anti-consumer.").

10 Comments of The Utility Reform Network and Utility Consumers Action Network at 3.

pursuant to the Commission's enforcement authority.[11] Had line items been unlawful *per se,* the Commission would not have permitted them or made clear that they would be subject to enforcement review. Neither NASUCA nor parties supporting the *Petition* offer evidence that all line items, regardless of how they are identified or described, are inherently misleading or deceptive. Contrary to the claims of commenters supporting NASUCA's request, line items are not *per se* misleading, deceptive, or confusing to consumers.[12] If NASUCA or any other entity believes that a carrier's line item is misleading or otherwise contrary to Section 201(b), the appropriate step is to file an FCC complaint providing details of the alleged misrepresentation.[13] Aggrieved parties should seek enforcement of the current truth-in-billing rules by Commission investigation of complaints, which is sufficient to address misleading business practices.[14]

II. THE COMMISSION SHOULD ALSO DENY THE *PETITION* FOR POLICY REASONS

As numerous parties point out, and as even one state supporting NASUCA concedes,[15] carrier bills contain communications to customers that are protected by the First Amendment. The threshold for the Commission to prohibit such commercial speech

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[11] Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking,* 14 FCC Rcd 7492, 7502-03, ¶ 19 (1999); *see also* Comments of BellSouth at 6; Comments of the United States Telecom Association at 6-7.

[12] Comments of MCI, Inc. at 4; Comments of the United States Telecom Association at 5.

[13] Comments of the Coalition for a Competitive Telecommunications Market at 4-5; Comments of Nextel at 22.

[14] Comments of National Telecommunications Cooperative Association at 2, 5. The Commission has repeatedly determined not to impose broad proscriptive rules on the wireless industry in particular, based on its finding that Section 201 provides aggrieved parties with sufficient protection against unjust or unreasonable carrier pricing or other practices. *See, e.g., Second CMRS Order,* 9 FCC Rcd at 1478-79.

[15] Comments of the Public Utilities Commission of Ohio at 2.

is high, and neither NASUCA nor supporting parties come close to meeting that threshold. This failure alone is sufficient to warrant denial of the Petition.

Commenters supporting the *Petition* provide a host of reasons why the Commission should grant NASUCA's request. These reasons are unavailing. For example, the Office of the People's Counsel for the District of Columbia argues that regulators have no way of knowing whether customers are being overcharged due to the fact that carriers do not provide cost data to the FCC.[16] Others argue that all of the costs of doing business should be included in rates.[17] But as detailed below, the FCC has not regulated CMRS rates or required CMRS carriers to present evidence of their costs with respect to rates. Such a change would require economic regulation of a competitive industry.

Certain state commissions argue that by placing discretionary charges in the "Taxes, Surcharges, and Fees" section of bills,[18] carriers lead consumers to believe that these are mandatory fees imposed by the government.[19] But two recent developments affecting wireless carriers undermines NASUCA's request for an absolute, sweeping prohibition of carrier line items on this basis. First, all of the major wireless carriers are participants in CTIA's Consumer Code.[20] The Code is a voluntary program that requires participating carriers to disclose in collateral and at the point of sale "whether any additional taxes, fees, or surcharges apply," as well as "the amount or range of any such

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16 Comments of the Office of the People's Counsel for the District of Columbia at 6.
17 Comments of the National Consumers League at 5.
18 Comments of the California Public Utilities Commission at 7.
19 Comments of the Indiana Utility Regulatory Commission at 2.
20 Comments of Cingular at 9-10; Comments of CTIA at 14; Comments of Nextel at 11-12.

fees that are collected and retained by the carrier."[21] The Code also requires carriers to distinguish between taxes, fees, and surcharges that are collected and remitted to the government and those fees that are designed to recover costs.[22] The Code thus provides customers with specific information about their bills and about specific line items on their bills that impose additional fees.

Second, Cingular Wireless LLC, Sprint Spectrum, L.P., and Verizon Wireless recently reached agreement on the terms of an Assurance of Voluntary Compliance ("AVC") with the Attorneys General of 32 states regarding, among other things, disclosures made to customers and billing practices related to taxes and carrier imposed surcharges. Because it markets and operates on a national basis, Verizon Wireless is following the terms of the AVC nationwide. These requirements specifically include the clear and conspicuous disclosure of the fact that monthly taxes, surcharges, and other fees apply, including a listing of the name or type and amount of any monthly discretionary charges that the carrier assesses. These carriers have agreed to structure their bills in such a way as to separate discretionary charges from taxes, fees, and other charges that they are required to collect directly from customers and remit to federal, state, or local governments. Furthermore, the carriers have committed not to represent, either expressly or by implication, that discretionary cost recovery fees are taxes.

The AVC represents an agreement between the carriers and the Attorneys General of more than half the states that the level of billing disclosures spelled out in the AVC will protect subscribers and provide them with information needed to select among competing service providers. NASUCA's *Petition* stands in direct conflict with the

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21 CTIA Consumer Code for Wireless Service, § 1.

22 *Id.,* § 6.

AVC's pro-consumer disclosure obligations. Rather than provide for more comprehensive disclosure and separation of charges, as the Attorney Generals determined was appropriate, NASUCA would have this Commission force carriers to suppress any disclosure and prohibit such charges.

Finally, the Massachusetts Office of Attorney General argues that because the FCC does not regulate surcharges, consumers must rely solely on existing market forces to keep line items in check, and that market pressure alone "is not sufficient to ensure that consumers are not deceived or to ensure that consumers can make accurate price comparisons."[23] To the contrary, NASUCA's requested relief would undermine, not advance, competition. Certain parties argue that granting NASUCA's request would have little impact on the marketplace. For example, National Consumers League argues that long-term contracts should not be impacted if the FCC grants the *Petition* because prices would not have to fluctuate very often, and long-term contracts can provide for price changes.[24] But as CTIA points out, carriers would have no incentives to provide long-term contracts, which save customers money, or national rate plans because of the need for localized rates.[25]

Carriers compete based on different pricing plans as well as different products and coverage.[26] Rate regulation decreases market efficiency in markets that are already

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[23] Comments of the Commonwealth of Massachusetts Office of the Attorney General at 2.

[24] Comments of the National Consumers League at 5.

[25] Comments of CTIA at 4-5.

[26] Comments of the Coalition for a Competitive Telecommunications Marketplace at 11.

competitive.[27] Carriers have incentives to disclose, advertise properly, and minimize customer service costs, because if they do not, they will lose customers.[28] The "apples-to-apples" comparison that NASUCA seeks risks turning service into a commodity, rather than permitting customers to differentiate.[29] For example, carriers also have different billing systems, and each system has its limitation.[30] Carriers with systems that provide the capability to produce bills that customers favor will win customers. The relief NASUCA requests would impede the ability of carriers to distinguish themselves in the marketplace.

III. THE COMMISSION SHOULD DECLARE THAT STATE REGULATION OF CMRS LINE ITEMS IS PREEMPTED

As Verizon Wireless made clear in its comments, NASUCA is effectively asking the FCC to permit the regulation of CMRS rates. The wireless carriers filing comments in this proceeding agreed. For example, Nextel argued that the NASUCA *Petition* threatens to undermine the FCC's plenary authority over CMRS rates and rate structures and reverse the economic benefits that competition has provided wireless consumers.[31] Sprint Corporation echoed this concern, charging that the NASUCA's request would result in unprecedented level of rate regulation of CMRS.[32] AT&T Wireless argued that the *Petition* essentially amounts to a request for the Commission to grant all states wireless rate regulation authority because permitting states to determine whether a charge

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[27] Comments of Leap Wireless International, Inc. at 6, *citing* W. Kip Viscusi et al., Economics of Regulation and Antitrust, 75 (3rd Ed., The MIT Press 2000) (1992).

[28] Comments of the Coalition for a Competitive Telecommunications Marketplace at 13.

[29] Comments of Leap Wireless International, Inc. at 12-13.

[30] Comments of the National Telecommunications Cooperative Association at 6.

[31] Comments of Nextel at 2.

[32] Comments of Sprint Corporation at 10.

was "expressly mandated" would preclude a wireless carrier from creating a separate charge for it and imbed it in rates.[33]

As detailed above and in Verizon Wireless's comments,[34] line-item surcharges are "rate elements." As an example of how the NASUCA request could result in economic regulation, the Ohio Commission ("PUCO") proposes requiring all carriers to attest to the accuracy of their charges, with the potential that carriers would have to provide cost studies to the FCC to justify them.[35] Yet despite this, the PUCO states that it is not suggesting economic regulation of CMRS providers.[36] As Sprint stated in its comments, this would require carriers to file hundreds of rate cases at the FCC, conducting rate regulation at an unprecedented level.[37]

States are preempted from regulating CMRS rates and rate elements.[38] Congress understood that CMRS "operates without respect to state lines" when it preempted state rate and entry regulation. Congress therefore adopted a "comprehensive, consistent regulatory framework [that] gives the Commission flexibility to establish appropriate levels of regulation" of CMRS.[39]

As certain parties detailed in their comments, various state have adopted or are considering CMRS regulation, including restrictions on carrier billing and rates. Nextel

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33 Comments of AT&T Wireless Services, Inc. at 2.

34 Comments of Verizon Wireless at 9-10.

35 Comments of the Public Utilities Commission of Ohio at 10.

36 *Id.* at 12.

37 Comments of Sprint Corporation at 10.

38 Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Memorandum Opinion and Order,* 14 FCC Rcd. 19898, 19907 ¶ 20 (1999); s*ee also* Comments of the Minnesota Department of Commerce at 3 (recognizing that state jurisdiction is limited with respect to CMRS).

39 *Second CMRS Order*, 9 FCC Rcd at 1417.

provides information as to rate regulation in Minnesota and California.[40] Verizon Wireless has also challenged state actions specifically seeking to suppress its ability to place line-item surcharges identifying government-imposed taxes on its bills in Pennsylvania and Vermont.[41] Federal oversight of CMRS is necessary to enforce Congress's clear determination that state-by-state regulations of CMRS rates would disserve the public interest, and that competition is far preferable to such regulation to promote expanded and improved wireless service to the public. In response to the *Petition,* the Commission should therefore declare that state regulation of CMRS line items is preempted.

IV. THE COMMISSION SHOULD DECLINE TO IMPOSE STANDARD LABELS

Some commenters suggest that rather than granting the NASUCA *Petition,* the Commission should consider concluding its proceeding on standardized labels.[42] For example, the PUCO argues that disclosures have proved a viable option for government regulation of commercial speech.[43]

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[40] *See* Comments of Nextel at 14-16.

[41] Pennsylvania did not adopt such a restriction. Compare Pa. HB 200 (Printer's No. 2820), section 11 at 25 (October 20, 2003) (adding paragraph (2.1) to 72 P.S. section 8101(i), prohibiting line item surcharge of gross receipts tax), reprinted at http://www2.legis.state.pa.us/WU01/LI/BI/BT/2003/0/HB0200P2820.pdf, to Pa. HB 200 (Printer's No. 3160), section 16 (December 20, 2003) (prohibition dropped), reprinted at http://www2.legis.state.pa.us/WU01/LI/BI/BT/2003/0/HB0200P3160.pdf. Vermont is investigating Verizon Wireless's recovery of a gross receipts tax through a line-item charge. *Investigation of Vermont RSA Limited Partnership and NYNEX Mobile Limited Partnership 1, both d/b/a Verizon Wireless, for compliance with Vermont Law Regarding Certificates of Public Good and Billing Practices*, P.S.B. No. 6651.

[42] Comments of Cingular at 23; Comments of the Public Utilities Commission of Ohio at 2.

[43] Comments of the Public Utilities Commission of Ohio at 7.

To demonstrate the problem that exists today with state regulation in the area of labeling, the PUCO proposes the creation of a "Government Sanctioned Charges" section for telecommunications bills.[44] The California Public Utilities Commission notes that it recently adopted a rule that requires a separate "Government Fees and Taxes" section of the bill.[45] Disparate requirements in different states impose huge costs on national companies with unified billing systems.

The NASUCA petition is not the appropriate vehicle for the Commission to take up the question of standardized billing. It has already conducted its Truth in Billing proceeding and did not adopt such standard labels. As an initial matter, mandating specific labels would raise First Amendment concerns. Though not a blanket ban such as the one NASUCA proposes, standard labels would implicate the First Amendment because they would restrict commercial speech. In order to withstand First Amendment review, the Commission must demonstrate that the harms that are the reason for the restriction are real and that the restriction would alleviate these harms to a material degree.[46]

Second, there is no evidence that carriers' line items are misleading and that standard labels would address a real harm to consumers. Although NASUCA makes the sweeping judgment that all line items not mandated by the government are misleading, the Commission's complaint data does not support NASUCA's assertion. As Sprint points out, the Commission received only one billing complaint for every 13,972 wireless

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44 Comments of the Public Utilities Commission of Ohio at 2.

45 Comments of California Public Utilities Commission at 2.

46 *See Edenfield v. Fane,* 507 761, 770 (1993); *Central Hudson Gas & Electric Corp. v. Public Service Commission ,* 447 U.S. 557, 569 (1980).

customers over the course of a year,[47] and this relates to all billing issues, not just those related to allegedly misleading line items.

Third, no party has demonstrated that Commission-mandated line item characterization would be by definition more clear than the manner in which any given carrier would choose to describe it. Is Cingular's "Regulatory Cost Recovery Fee" more or less misleading than Leap's "Regulatory Recovery Fee" or AT&T Wireless's "Regulatory Programs Fee"? Likewise, is California's description of a portion of the bill as "Government Fees and Taxes" less misleading than Ohio's proposed "Government Sanctioned Charges" section? Thus, even if some carrier line items were misleading, there is no guarantee that standard labels would solve this problem, making such a restriction unlikely to survive First Amendment review.

Finally, carriers' billing systems also have space limitations, and a surcharge description that imposes no costs on one carrier might have a very different impact on other carriers. The Commission should let the marketplace choose winners and losers, not provide advantages to certain carriers based on regulatory burdens.

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[47] Comments of Sprint at 9.

CONCLUSION

For the foregoing reasons, and those set forth in the comments in this proceeding, the FCC should deny the *Petition.*

Respectfully submitted,

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